Supreme Court, U.S.
FILED

NO. 05-362 JUL 15 2005

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD KERSH - PETITIONER

vs.

ESTATE OF MARILYN SCHWARTZ AND

WACHOVIA BANK, N. A. - RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

FOURTH DISTRICT COURT OF APPEALS OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

RICHARD KERSH

139 BRIGHTON D

BOCA RATON, FLORIDA 33434

(561) 477-1515

QUESTIONS PRESENTED

Are the Fifth, Eighth, and Fourteenth Amendments violated by the Florida Court not adhering and abiding by the Florida Constitution article V, section 2 (a) ".....practice and procedure.."

Are the Fifth, Eighth, and Fourteenth Amendments violated by the Florida Court not adhering and abiding by Florida Constitution article V, section 2 (a) "...the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked,..."

Are the Fifth, Eighth, and Fourteenth Amendments violated by the Florida Court not adhering to the limitation on the court in the Florida Constitution article V, section 2 (a) "... and a requirement that no cause shall be dismissed because an improper remedy has been sought."

List Of Parties

1. Estate of Marilyn Schwartz

2. Wachovia Bank, N. A.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **state courts:**

The opinion of the highest state to review the merits appears at Appendix A to the petition and is

[X] reported at 892 4Dist, 1047 So.2d (2004); or ,
[ ] has been designated for publication but is not yet reported; or
[ ] is unpublished.

The opinion of the Circuit Court Of The 15th Judicial Circuit In And For Palm Beach County, Florida Appears at Appendix C to the petition and is

[ ] reported at_____;
or,
[ ] has been designated publication but is not yet reported;
or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **state courts:**

The date on which the highest state court decided my case was December15, 2004. A copy of the decision appears at Appendix A.

[X] A timely petition for rehearing was thereafter denied on the following date: February 28, 2005, and a copy of the order denying rehearing appears at Appendix B.

[X] An extension of time to file the petition for writ of certiorari was granted to and including July 15, 2005 on June 1, 2005 in Application No. 04A1009.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The State of Florida 's Constitution, article V, section 2(a) The Supreme Court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

The Florida Constitution annotate, art.1§17, access to courts, the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Under Florida Court Rule 1.410(a), Subpoena; generally, Subpoena for testimony before the court, subpoenas for production of tangible Evidence, and subpoenas for taking depositions may be issued by clerk of court or by any attorney of record in an action

Florida Probate Statute § 733.105(3), Determination of Beneficiaries. A separate civil action to determine beneficiaries may be brought when an estate has not been administered.

Florida Banking Statute § 655.79 (1)and (2). Deposits and accounts in two or more names; presumption as to vesting on death:

(1) Unless otherwise expressly provided in a contract, agreement, or signature card executed in connection with the opening or maintenance of an account, including a certificate of deposit, a deposit account in the names of two or more persons shall be presumed to have been intended by such persons to provide that, upon the death of any one of them, all rights, title, interest, and claim in , to, and in respect of such deposit account, less all proper setoffs and charges in favor of the institution, vest in the surviving person or persons.
(2) The presumption created in this section may be overcome only by proof of fraud or undue influence or clear and convincing proof of a contrary intent. In the absence of such proof, all rights, title, interest, and claims in, to, and in respect of such deposits and account and the additions thereto, and the obligation of the institution created thereby, less all proper setoffs and charges in favor of the institution against any one or more of such persons, upon the death of any such person, vest in the surviving person or persons, notwithstanding the absence of proof of any denotive intent or delivery, possession, dominion, control, or acceptance on the part of any person and notwithstanding that the provisions hereof may constitute or cause a vesting or disposition of property or rights or interests therein, testamentary in nature, which, except for the provisions of this section, would or might otherwise be void or voidable.

Statute 772.11, Civil Theft.

Fifth Amendment:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

Grand Jury,..... nor be deprived of life, liberty, or property, without due process of law;.....

Eighth Amendment: cruel and unusual punishment

Fourteenth Amendment:
(1) Persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On August 30, 2000, Belle Kersh entered into an agreement with her two children, Richard Kersh and Marilyn Schwartz, that they would go by the terms of her will on her death. Belle Kersh retained the right to change her will anytime up to death. If Belle Kersh wanted Marilyn Schwartz to have all her money and/or property, she would have changed her will to reflect this. Belle Kersh had two and half years in which to change her will. Marilyn Schwartz lived with her mother because she did not work and had no income or money of her own. Belle Kersh had Marilyn Schwartz's name on her account for convenience. Before her husband death in 1998, Belle Kersh had his name on her account. Belle Kersh always had someone on her bank account with her. That is how she wanted it. On March 15, 2003, Belle Kersh died. Marilyn Schwartz was in physical control of all Belle Kersh's assets. Marilyn Schwartz would not probate the estate of Belle Kersh nor would she divide up Belle Kersh's estate according to Belle Kersh's will. Belle Kersh had named Marilyn Schwartz executive of her estate in her will. The first complaint was filed on Marilyn Schwartz on March 18, 2003. The complaint was not served on Marilyn Schwartz because her address was unknown. On April 1, 2003, a copy of the decedent, Belle Kersh's agreement and will was handed delivered to Wachovia Bank, N.A. with a letter warning that the bank about civil theft and giving the money left to Petitioner to the wrong party. On this date, the money was still in Wachovia Bank, N.A. On April 3, 2003, Petitioner tried to serve a subpoena on Wachovia. Wachovia employees had an off duty Broward County Sheriff deputy, working for the bank, threaten arrest for trespass. Petitioner has an relationship with Wachovia and as such in a business contact is suppose to be able to bank at any branch.

Now, Petitioner is unable to bank at least one branch. On March 25, 2003, Petitioner filed an amended complaint adding Wachovia Bank, N.A. but did not allege any causes against Wachovia. Marilyn Schwartz was served April 26, 2003. At the April 21, 2003 hearing, the lower court told Petitioner to send the order denying freezing funds when Petitioner finds out where Schwartz is living. May 27, 2003, Petitioner filed second amended adding causes against Wachovia. Petitioner had a Marilyn Schwartz's telephone number Defendant, Marilyn Schwartz told Petitioner, she hired an attorney to get the money from Wachovia Bank, N.A. Petitioner wanted to know what Defendant Marilyn Schwartz said to the bank to have the money released. Petitioner can only allege that his sister, Marilyn Schwartz, told the bank the agreement was a fake even though it turned out to be a valid agreement that was admitted at the August 8, 2003 by the attorney for Schwartz. The bank released the money on this basis without checking further. When the bank released the money to Marilyn Schwartz, this amounted to helping the theft of an estate under Florida banking statute § 655.79. Statute § 655.79 says that the decedent is giving a gift of all the funds in a joint bank account to the joint account holder unless there is intent to the contrary. Belle Kersh had this agreement and a will showing her intent. Plus, Belle Kersh could have changed her will any time if she wanted Marilyn Schwartz to have all monies in her accounts. On March 16, 2003 Petitioner called Schwartz to ask what is going to happen to Belle Kersh's estate. The answer was Schwartz would keep it. This was a estate, Marilyn Schwartz had also told relatives she was going to run with the money and keep it all. Bringing this to the attention of the State of Florida, Florida law enforce would not bother with it, saying it is a civil matter. The bank is fighting tooth and nail that it did nothing wrong except gave the money to the wrong party. The lower court where civil actions are litigated,

will not bother with estate law. At the August 8, 2003 or sooner, the civil division found out this was an estate matter, the judge, with no jurisdiction to handle this type of litigation, should have transferred it to the probate division, but did not. Under probate statute § 733.105(3), Determination of Beneficiaries, Petitioner filed a civil action in what should have been a probate action. Petitioner went into civil court four times to get an injunction to put Belle Kersh's money into court to determine how it would be split between Belle Kersh's two children. The lower court refused. The civil court would treat this case as a simple breach of contract and would not protect Petitioner's share of the estate. The first three times the petitioner went before the lower court seeking an injunction, the lower court refused. The judge said at the third motion hearing to freeze the funds, "don't come back to my court unless you have an attorney any attorney. "The fourth time was with the attorney from Wachovia Bank, N.A. In a May 9, 2003 motion, the bank stated it had no accounts in the name of Belle Kersh and that an inheritance is a mere expectancy. The Bank admitted releasing Belle Kersh's money. The lower court stated that an inheritance is a mere expectancy in its April 21, 2003 order denying the motion to freeze the money from Belle Kersh's bank accounts. The judge now knew this was basically a matter for probate court and know her court did not have jurisdiction. The judge would not transfer the complaint to the proper court. Petitioner alleged that this is a going estate because the Belle Kersh died. It is not where a beneficiary is waiting for the person to die. The lower court here decided the defendants are always right and the Petitioner is always wrong except for breach of contract against Schwartz. The lower court decided to change the decedent's intent by disregarding a will and rule it is a simple agreement breach. Maybe, Petitioner had the wrong remedy of going into the wrong division of circuit court. Probate division would have been better than civil

division. However, Probate Statute 733.105(3) influenced which court. It mentions civil. The Palm Beach sheriff said it is a civil matter. Petitioner has very limited legal experience. Petitioner issued a subpoena to Wachovia Bank, N.A. to find out how much money was in Belle Kersh's bank account on the date of death. In accounting audits, you always go to the independent source, the bank. Wachovia Bank, N.A. ignored the subpoena and the lower court refused to enforce the subpoena. The circuit court refused to allow the Petitioner to discover the dollar balances in the bank. The history of Marilyn Schwartz was that she could not be trusted for the right balances. She had doctored a statement in the past so that the true balance would not be found out. The State of Florida has labeled on all court documents Petitioner as attorney of record. Under Florida court rule 1.410(a) an attorney of record can issue a Subpoena. Petitioner's original complaint was against Marilyn Schwartz. The first amended the complaint added Wachovia Bank, N.A. without stating any causes. There was never any court action on either the original and the first amended complaint. The second amended complaint expanded to add causes with a remedies against Wachovia Bank, N.A. In a hearing August 8, 2003, Attorneys for both defendants argued that Petitioner had causes with the wrong remedy. The attorney for Marilyn Schwartz admitted that the agreement was valid. This admission should have ended the case and monies should have been put in court. The lower court refused to do anything. The lower court dismissed all causes for Wachovia Bank, N.A. with prejudice and for Marilyn Schwartz without prejudice. Petitioner appealed the decision. The 4th District Court of Appeals affirmed.

The causes against Wachovia Bank, N.A. which were dismissed with prejudice are:

1. Florida Statute § 772.11. Civil Theft. The Bank helped Schwartz steal Petitioner's share of his mother's estate.

2. Florida Banking statute § 655.79 (1)and(2), Deposits and accounts in two or more names; presumption as to vesting on death.

3.Florida Probate Statute § 733.105 (3), Determination of Beneficiaries.

4. Florida Court Rule 1.410(a). Subpoena.

5. Having an off duty Broward County Sheriff Deputy working for the Wachovia Bank, N. A threaten arrest of trespass at that branch to deliver a subpoena to, because the bank employees did not want to receive a subpoena.

Petitioner issued interrogatives to Wachovia Bank, N.A. to find out bank balances of date of death and what defendant. Marilyn Schwartz said to the bank to have the money released. Wachovia Bank, N.A. motioned for a protective order not to answer the interrogatives. The lower court issues a protective order on the grounds of privacy for Schwartz because it is Schwartz's money. This is where the lower court decided the case before any trial. Petitioner went before the lower court for a motion for default because the defendant, Marilyn Schwartz, did not answer a pleadings in over sixty days. The lower court refused to sign anything. The lower court left the Petitioner without a remedy. After motion to 4th District Court of Appeal, lower court sent a default. The Lower court refuses to give an order for a judgment. The Petitioner has gone three times for a judgment with the lower court refusing to issue anything. The Petitioner motioned the judge to remove herself. The judge refused. The 4th District Court of Appeals affirmed. Both courts say Wachovia bank, N.A. did nothing wrong. Both courts refused to enforce the constitutional law in Florida. Because the lower court feels this is a simple breach of contract, Petitioner may have filed in the wrong court seeking a remedy but asking the wrong court for it. Marilyn Schwartz died on October 29, 2003. Petitioner was not notified about the death of his sister till November 24, 2003 letter appeared in the mail. The petition for the estate of Marilyn Schwartz were two attorneys who said they do not have a client

who hired them. One attorney says he heard about the death from a source at the nursing home. The two attorneys filed a petition for curator for the estate of Marilyn Schwartz. The petition had discrepancies but was allowed by Judge George Greer. The estate of Marilyn Schwartz holds the estate of Belle Kersh. Judge George Greer ruled that separation of the estates will not come until he rules on the validity of the will. Petitioner alleges that the estate of Marilyn Schwartz is spending the monies and throwing or giving away the assets belonging to the estate of Belle Kersh. The will of Marilyn Schwartz was a self proofing will. In Florida, a self proofing will must have two witnesses and a notary. The will is void to form because there is only one witness and one notary. A notary can not be a witness because the notary is not authorized by the State of Florida to notarize his own signature. Judge George Greer has not ruled on the validity of the will as the court says it is always premature. The will has been filed in court. Meanwhile, Judge Greer allows money from Belle Kersh's estate to be spent through the estate of Marilyn Schwartz. In conclusion, this is not fair and it is not justice. Justice in the State of Florida is broken. The rule of law exist on paper only not in the courtroom.

REASONS FOR GRANTING THE CASE

The first reason for granting the case is that of the"due process" and equal protection clause" of the Fourteenth Amendment. The State of Florida refused to abide by it's constitution. The Florida Constitution is the law of the state. This is the rule of law. The courts have ignored from the Florida Constitution the rules for the practice and procedure, the transfer to the court having

jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. The 4th District Court of Appeals affirmed the dismissal by the circuit court, civil division. Both courts did not abide by the Florida Constitution making up their own law and imposing attorney costs. The circuit court-civil should have transferred this case to the circuit court-probate. Petitioner file the complaint in circuit court-civil division using probate statutes to get the will of Decedent Belle Kersh to be honored per an agreement signed by Belle Kersh, Richard Kersh and Marilyn Schwartz. The circuit court-civil division learned that it had no jurisdiction to handle an estate but kept the case anyway. The Petitioner used the wrong remedy by going into civil court and not probate court to have a will administered and the enforcement of an agreement to go by a will where the parties of the agreement agreed to go by the will if Belle Kersh died. Belle Kersh died.

Under "due Process" of the Fourteenth Amendment, it is the concept of basic fairness. If Florida will not apply the procedures fairly, then there is no due process. In Rupp v Grantsville City (1980, Utah) 610 P2d 338, "Due process" rest on concept of basic fairness of procedure and demand procedure appropriate to case and just to parties involved. The State of Florida did not use the transfer procedure to the proper jurisdiction fairly. After the circuit court-civil learned that this was a probate matter where it had no jurisdiction, the proper procedure under the Florida Constitution article V section2(a), was for this circuit court-civil division to transfer the case to the probate division and did not. The circuit court-civil could not apply the law fairly because it had no jurisdiction. Thus, the circuit court-civil could not administrate justice fairly. With no jurisdiction, there is no due process and no justice. With no jurisdiction, the circuit court-civil ignored the will and dismissed all causes the were estate related with prejudice because the circuit court-civil could not rule on those causes. The

State of Florida did not use the procedure of dismissal with prejudice fairly. All causes dismissed, with prejudice against Wachovia, were not fair. These causes can not ever be brought back with the right remedy. Petitioner second amended complaint was the first complaint that encompassed causes against defendant, Wachovia Bank, N.A. These first time causes were all dismissed for the wrong remedy with prejudice. Besides not adhering to form in cause writing which Petitioner could correct by amending, there is a constitutional mandate that no cause can be dismissed for the wrong remedy. In State v Johnson, 306 So.2d 102 (1974), the Florida Supreme Court recognizes the constitutional mandate. In Symon-Ryals Group, Inc. v Citizens & Southern Mortg. Co., App. 1 Dist., 334 So.2d 144 (1976), the appellant court recognizes the constitutional mandate. Thus, Petitioner did not have a change to bring back the cause with the proper remedy. In Mayberry v Pennsylvania (1971) 400 US 455, 27 L Ed 2d 532, 91 S Ct 499. whether trial is federal or state, concern of due process is with fair administration of justice. The State of Florida did not use the procedure to amend fairly. All causes were dismissed with prejudice for Wachovia Bank, N.A. Thus, the Petitioner was not afforded the opportunity to amend a complaint after only one attempt for the dismissed with prejudice Wachovia causes. The courts just ignored the Florida Constitution. In Carey v Piphus (1978) 435 US 247, 55 L Ed 2d 252, 98 S Ct 1042, the right to procedural due process is absolute. The State of Florida did not use the procedure of issuing a subpoena fairly. Under Florida Rules of Court 1.410(a), a subpoena may be issued by clerk of court or by any attorney of record in an action. The courts labels a license attorney and a pro si person "the attorney of record." The Petitioner is labeled the attorney of record. The usage of the phrase "attorney of record" opposed to "licensed attorney" meant intended for both a licensed attorney and the pro si person could issue a subpoena. By ignoring the subpoena, the court breached its own Florida court rules. The State of Florida states the Petitioner must follow the Florida Court

rules. If the State of Florida does not let Petitioner follow the court rules then, the Petitioner does not have access to the court on the same terms as a licensed attorney. The Petitioner is at a disadvantage representing himself. Thereby, the Petitioner has no remedy in Florida court. Due process is the use of procedures fairly. Thus, if there is no fair procedure due process then, there is no lawsuit and no justice.

Under the "equal protection clause" of the Fourteenth Amendment, is the concept that laws are applied evenhandedly. First, The State of Florida did not use equal protection evenhandedly. Filing this action in circuit court- civil division instead of probate division, Petitioner used the wrong jurisdiction of the circuit court. Petitioner should have brought the action in probate division of circuit court. Petitioner seeks to have this case transferred to the proper court. In State v. Johnson, 306 So.2d 102 (1974), the State of Florida filed an action in the wrong court and was dismissed and affirmed by the appeals court. On appeal, the Supreme Court recognizing the constitutional mandate and allowed the State of Florida to file in the proper court. If the State of Florida is allowed to correct the wrong remedy, then Petitioner should also be allowed. Second, the State of Florida did not use the equal protection clause evenhandedly. It is not the fact that all causes were dismissed. It is how the causes were dismissed. Petitioner had all causes dismissed with prejudice for Wachovia and without prejudice for Schwartz. All the causes were alike in that they all had the wrong remedy. However, the lower court did not treat them the same. Under the equal protection clause, all causes having the wrong remedy should have been dismissed the same. In State v Johnson, 306 So.2d 102 (1974), the Florida Supreme Court recognizes the constitutional mandate. In Symon-Ryals Group, Inc. v Citizens & Southern Mortg. Co., App. 1 Dist., 334 So.2d 144 (1976), the appellant court recognizes the constitutional mandate. In Vacco v Quill (1997) 521 US 793, 138 L Ed 2d 834, 117 S Ct 2293, 97 CDOS 5027, 97 Daily Journal DAR 8122, 11 FL W Fed S 174, the equal protection clause

is that states must treat like cases alike but may treat unlike cases accordingly. If the rule of law, the Florida Constitution, is not followed, then Florida is susceptible to anarchy without a constitution. The State of Florida should abide by its constitution or change the constitution with ratification by the people. Therefore, the State of Florida has effectively stopped a United States Citizen living in the state of Florida "due process" and "equal protection" under the Fourteenth Amendment.

The Second reason to grant the case is the Eighth Amendment when combined with the Fourteenth Amendment. It maybe a little further out than the current normal use but it is valid, nevertheless. The Florida Constitution is the law in the state. It is a cruel and unusual punishment for a United States citizen under the jurisdiction of the State of Florida to have the Florida Constitution ignored by the courts for civil action. In Cooper Indus. V Leatherman Tool Group, Inc (2001, US) 149, the due process clause of the Federal Constitution's Fourteenth Amendment makes cruel and unusual punishment to the states. This was referring to criminal but it should also apply civil. It is not "due process"for a wrong procedure nor "equal protection" when others accorded the law but for the state not "abide" is punishment and it is "cruel" to be on the receiving end. The State of Florida will not abide by or be limited by its law, the constitution. The Eighth Amendment should be applied to the State of Florida when it won't abide or be limited by the rule of law both criminal and civil. There is a difference of interpreting a law than to abide by or be limited by the law. Through the Florida Constitution, the citizens of Florida put limits on the State of Florida but, the State of Florida wants not to be limited. Judges are ignoring or making up there own laws and rules in Florida. The cruel and unusual punishment is that the State of Florida through it's courts will not abide by Florida's constitution and then, impose costs. The opportunity for a remedy for Florida citizens is punishment if the State of Florida will not abide by its constitution. In Ford v Wainwright (1986) 477 US 399, 91 L Ed 2d 335, 106 S Ct 2595,

2595, Supreme Court takes into account objective evidence of contemporary values before determining whether particular punishment comports with fundamental human dignity that Eighth Amendment protects. The eighth Amendment should prevent this type of judicial abuse and punishment. Therefore, the State of Florida has effectively imposed a cruel and unusual punishment on a United States citizen living in the State of Florida by not adhering to the Florida Constitution in dismissing the causes with prejudice against Wachovia and allowing costs.

The third reason to grant the case is the fifth Amendment when combined with the Fourteenth Amendment. For a court to ignore the Florida Constitution is discrimination against Petitioner. In Johnson v Robinson (1974) 415 US 361, 39 L Ed 2d 389, 94 S Ct 1160 (criticized in Hall v United States Dep't Veterans' Affairs (1996, CA 11 Fla) 85 F 3d 532, 9 Fl W Fed C 1171) forbid discrimination that is so unjustifiable as to be violative of due process. Therefore, the State of Florida has effectively stopped a United States citizen living in the State of Florida from due process using the practice and procedures in the Florida Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Richard Kenah

Date: 9-15-05

APPENDICES

APPENDIX A

IN THE DISTRICT COURT
OF APPEALS OF THE STATE
OF FLORIDA
FOURTH DISTRICT
JULY TERM 2004

RICHARD KERSH,

APPELLANT

V

MARILYN SCHWARTZ
and WACHOVIA BANK, N.A.
Appellees.

CASE NO. 4D03-3540

Appeal of a non-final order
from the Circuit Court Judicial
Circuit, Palm Beach County;
Diana Lewis, Judge; L.T. Case
No.CA 03-2924 AF.

Richard Kersh, Boca Raton, pro se.

John H. Pelzer, Dale W. Cravey, and David A. Green of Ruden, McClosky, Smith, Swchuster & Russell, P>A> Fort Lauderdale, for appellee Wachocia Bank, N.A.

DATE: OAW in lieu of OA
December 3, 2004.

PANEL: (Polen), Stevenson, Gross

Pending Motions: A/MFees

Rehearing Deadline:

❑ Standard 15 days per rule 9.330

Directory: Polem

DISPOSITION

❑ 1. Affirmed

❑ PCA

Endoremements	Date	Circulate
-S	12-3-04	N0
-S	12-3-04	No
-S	12-3-04	No

APPENDIX B

IN THE DISTRICT COURT OF APPEALS OF THE STATE OF

FLORIDA FOURTH DISTRICT,
P.O. BOX 3315, WEST PALM
BEACH, FL 33402

March 17, 17, 2005

Case No.: 4D03-3540
L.T. No.: CA 03-2924 AF

RICHARD KERSH
V
ESTATE OF MARILYN
SCHWARTZ & WACHOVIA
BANK

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed February 28, 2005, for rehearing is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

-S
MARILYN BEUTTENMULLER, clerk
Fourth District Court of Appeal

APPENDIX C

IN THE CIRCUIT COURT OF THE 15TH
JUDICIAL CIRCUIT IN AND FOR PALM

BEACH COUNTY, FLORIDA

Case No. 03-002924 AF

RICHARD KERSH
Plaintiff
V
MARILYN SCHWARTZ AND
WACHOVIA BANK, N.A.
Defendants
_____/

ORDER GRANTING WACHOVIA BANK, N.A.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

AND
MARILYN SCHWARTZ'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

This Cause came on to be heard by the court August 8, 2003, upon Wachovia Bank, N.A.'s ("Wachovia") Motion to Dismiss Second Amended Complaint and Marilyn Schwartz's ("Schwartz") Motion to Dismiss Second Amended Complaint, and the Court having reviewed the Motions, having considered argument of Plaintiff and counsel for Defendants, and being otherwise fully advised, makes the following

FINDINGS and CONCLUSIONS:

A. While Plaintiff is a pro se litigant, he is not

immune from the Rules of Civil procedure. Barrett v. City of Margate, 743 So2d 1160, 1162(Fla 4th DCA 1999).

B. Despite prior repeated attempts, Plaintiff's Second Amended Complaint (the "Complaint") is not a simply and succinctly started short and plain statement of ultimate facts purportedly entitling Plaintiff to relief, as required by Fla. R. Civ. P.1.110(b), and does not set out the elements of Plaintiff's claims or facts that support them, but it does contain improper opinions, theories, legal conclusions and argument. See Barretti, 743 So.2d at 1162. Plaintiff's Second Amended Complaint is a disorganized assortment of allegations and argument that clearly fails to comply with even the most minimal standards of pleading as required by the Florida Rules of Civil Procedure. Id.

C. Each count of the Complaint improperly incorporates each count of the Complaint. Gerentine v. Coastal Security Systems, 529 So.2d 1191, 1194 (Fla. 5th DCA 1988); Frugoli v. Winn-Dixie Stores., 464 So.2d 1292, 1293 (Fla. 1st DCA 1985).

D. Plaintiff improperly and without authorization attempted to assert a claim for punitive damages. F. S.§768.72. Kraft General Foods, Inc. V. Rosenblum. 635 So.2d 106, 110 (Fla. 4th DCA 1994). E. Plaintiff failed to give the notice required by F. S.§772.11 prior to attempting to assert a claim for civil theft.

F. Wachovia did not and does not owe any duty to Plaintiff to F. S.§655.78 or 655.79.

G. Each and every count of the Complaint fails to properly allege a cause of action.

ORDERED and ADJUDGED as follows:

1. Wachovia Bank, N. A.'s Motion to Dismiss Second Amended Complaint and Marilyn Schwartz's Motion to Dismiss Second Amended Complaint are hereby
GRANTED AS FOLLOWS:

a. Count I of the Complaint is hereby dismissed with Prejudice as to Wachovia and without prejudice as to Schwartz. b. Count II of the Complaint is hereby dismissed
with prejudice as to Wachovia and without as to Schwartz.

c. Count III of the complaint is hereby dismissed with prejudice as to Wachovia and without prejudice as to Schwartz.

d. Count IV of the complaint is hereby dismissed without prejudice.

e. Count V of the complaint is hereby dismissed without prejudice.

f. Count VI of the complaint is hereby dismissed without prejudice.

g. Count VII of the complaint is hereby dismissed without prejudice.

h. Count VIII of the complaint is hereby dismissed without prejudice.

i. Count IX of the complaint is hereby dismissed without prejudice.

j. Count X of the complaint is hereby dismissed without prejudice.

k. Count XI of the complaint is hereby dismissed without prejudice.

l. Count XII of the complaint is hereby dismissed without prejudice.

m. Count XIII of the complaint is hereby dismissed without prejudice.

n. To the extent Plaintiff seeks to file a Third Amended Complaint, he must allege the appropriate elements of each cause of action that he claims and provide sufficient factual allegations to adequately notify the Defendants of the nature of

each claim. Further, Plaintiff is admonished not to attempt to plead any cause of action that is not supported by the law of Florida. If Plaintiff attempts to re-plead any of the causes of action addressed in the prior Motions or at the hearing thereon and he fails to state a cause of action in accordance with relevant case law and statutory authority, the Defendants may move for entry of an award of sanctions. The Court will consider awarding Defendants their attorney's fees if they are required to argue the same issues addressed at the hearing one Motions.

o. Plaintiff shall not include a claim for civil theft in his Third Amended Complaint unless he complies with the requirements of F. S. §772.11.

p. Plaintiff shall not include a claim for punitive damages in his Third Amended Complaint unless and untill he receives authorization to do so in compliance with the requirements of F. S. §768.72.

q. If at all possible and subject to Defendant Schwartz's medical availability, Plaintiff and Schwartz shall schedule and intend mediation at the Palm Beach County Courthouse (205 N. Dixie Highway, West Palm Beach, Florida) within forty-five (45) days of the date of this order. Wachovia is specifically excluded from this requirement and is not required to attend mediation in this case at this time.

Plaintiff shall have 20 days to file a Third Amended Complaint.

DONE AND ORDERED AT West Palm Beach, Palm Beach County, Florida on this 21st day of August, 2003.

-S

DIANA LEWIS
Circuit Court Judge